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IN THE  
SUPREME COURT OF THE  
UNITED STATES

October Term, 1945

No. 1154

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BASIL R. CRAMPTON,  
*Petitioner,*

VS.

CRAMPTON MANUFACTURING COMPANY,  
*Respondent.*

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PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SIXTH CIRCUIT WITH SUPPORTING  
BRIEF

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AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN



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**PETITION FOR A WRIT OF CERTIORARI TO THE  
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FOR THE SIXTH CIRCUIT**

To the Honorable Chief Justice and Associate Justices of  
the Supreme Court of the United States:

Your petitioner, Basil R. Crampton, respectfully prays  
that a Writ of Certiorari be issued to review a decision  
of the Circuit Court of Appeals for the Sixth Circuit,  
entered January 28, 1946.

A Transcript of the Record, including the proceeding  
in said Circuit Court of Appeals is furnished herewith,  
in accordance with Rule 38 of the Rules of this Court.

**OPINIONS BELOW**

The opinion of the District Court is reported in 62  
U. S. P. Q., 270 (Western District Michigan, Southern Di-

vision, 1944) and is in the Transcript at pages 19, 20. There is no Fed. Supp. report.

The opinion of the Circuit Court of Appeals for the Sixth Circuit is not yet reported in the Fed. Rep., but is reported in 68 U. S. P. Q. 122, and is in the Transcript at pages 184-192.

## JURISDICTION

The jurisdiction of this court is invoked under section 240-a of the Judicial Code, as amended by the Act of Feb. 13, 1925 (28 U. S. C. 347); and section 5 (b) of Rule 38 of this court.

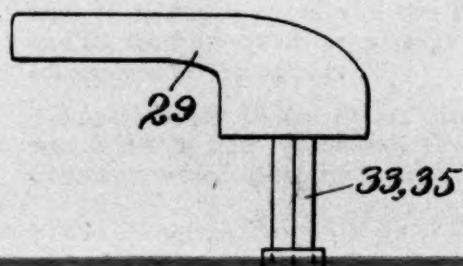
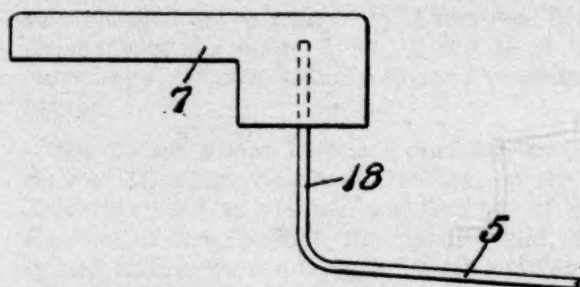
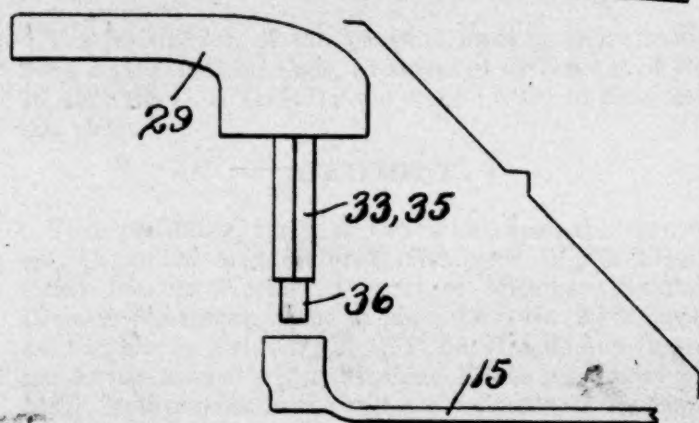
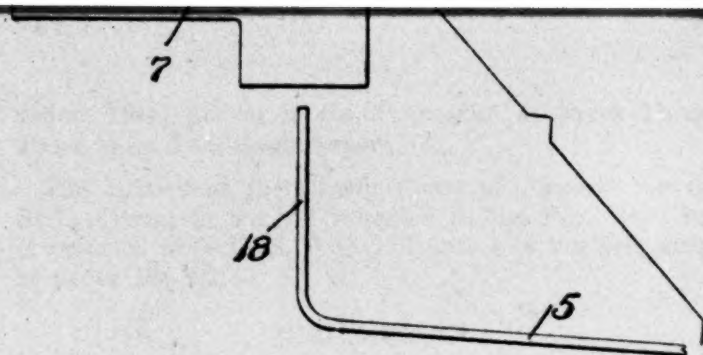
## STATEMENT

Your petitioner, Basil R. Crampton, sued the respondent, Crampton Manufacturing Company, in the District Court for the Western District of Michigan, Southern Division for infringement of his patent, No. 2,233,159, issued to him on February 25, 1941 for Handle and Operating Lever Assembly for Flushing Tanks (Transcript p. 148). Both parties to the suit are residents of the Southern Division of the Western District of Michigan. The suit charged infringement by Crampton Manufacturing Company of the claims 2, 11, 12 and 13 of the aforesaid patent by Crampton Manufacturing Company, respondent herein.

The United States District Court for the Western District of Michigan, Southern Division, on the 13th day of July 1944 filed an opinion, and findings of fact and conclusions of law, holding the patent valid, and that the named claims were infringed. Such opinion of the District Court for the Southern Division of the Western District of Michigan appears in the Transcript at pages 19 and 20, the findings of fact at page 21 to page 26, and the conclusions of law at page 26.

Appeal to the United States Circuit Court of Appeals was taken by the respondent, Crampton Manufacturing Company, which court rendered its decision and entered





its judgment on the 28th day of January, 1946, (Trans. 183) holding claim 2 invalid, and holding claims 11, 12 and 13 valid, but not infringed. Rehearing denied March 11, 1946.

The opinion of the Sixth Circuit Court of Appeals in this case is at page 184 of the Transcript.

A disclaimer of claim 2 of said letters patent No. 2,233,159 has been executed by the sole owner of the patent, Basil R. Crampton, the petitioner herein, and has been forwarded to the Commissioner of Patents at Washington, D. C. for filing.

This petition is with the respect to claims 11, 12 and 13, which have been held valid by both the District and the Appellate Courts, and held infringed by the District Court and not infringed by the Appellate Court.

The issue, and the one only in this case, with respect to infringement of claims 10, 11 and 12 of the aforesaid patent, which fact of infringement was found by the District Court and reversed by the Appellate Court, lies in the differing points of permanent connection of the two initially fabricated parts of the manually operable lever member of the Handle and Operating Lever Assembly: One as disclosed in the Crampton patent 2,233,159, which is in the Transcript at page 148, and the lever member manufactured by the respondent, which is made in accordance with the disclosure in a subsequent patent, 2,213,840, granted March 16, 1943, upon the application of Pleasant et al, assigned to the respondent. A copy of such later patent is in the Transcript at page 160-e.

The accompanying drawing shows in its upper bracketed two figures the handle of the patent in suit, numbered 7, and the lever, numbered 5, with its lateral extension at one end, numbered 18, separate as they are initially fabricated. Immediately below, similarly bracketed, is the handle member 29 of the patent to Pleasant et al, a spindle laterally positioned at one end and integral therewith, numbered 33, 35, the spindle having a tip of reduced dimensions, 36, at its free end. Bracketed with it is the inside lever member numbered 15.

The two parts, the handle 7 in Crampton and the lever arm 5 and its integral lateral extension 18, in the completed flush tank lever are *permanently* and *inseparably* connected together, by the free end of the lateral extension 18 entering a socket in the handle and a rigid permanent connection made, one that is integral in effect and which can not be broken without overcoming the molecular cohesive force of the metal. The two parts in the infringing lever are *permanently* and *inseparably* connected together by passing the tip 36 of spindle 33, 35 of the patent to Pleasant, et al (transcript 160-e) through a hole at the bottom of a socket, numbered 28, at the end of the inside lever arm 15, and riveting or heading over the outer end of the tip 36; also one integral in effect, and which can not be broken without disrupting metal by pulling it apart and overcoming its molecular cohesion.

In the two figures at the lower part of the drawing, the upper figure thereof shows the two parts of the Crampton disclosure (transcript 148) in their permanent, inseparable connection. Below it, the last figure on the drawing, the two initially separately fabricated parts of the respondent's lever are shown permanently and inseparably connected together. They are the same, as thus permanently connected.

This movable lever member and handle assembly, which is operated by pushing down on the handle at the outside of the tank, in each has a tank wall fixture to which many names are given in the patents and by the trade. Generally, in the trade, it is known as a "spud" and the decision of the 6th C.C.A. calls it that. This spud or fixture which passes through an opening in the tank wall is mounted between the handle and the inside lever arm, which in the trade is known as the "lift arm".

To mount the spud the movable handle and lever element in each is initially made of two separated parts. Such spud is slipped over the integral "extension" 18 of the lever 5 in Crampton and, similarly slipped over the "spindle" 33, 35 of the respondent's structure, after which the two parts of the movable handle and lever, in both cases, are *permanently*, rigidly and integrally in-

separably connected in the manners previously set forth, with the spud mounted on said "extension" or "spindle", which provide rock shafts about the longitudinal axes of which the identical lever and handle permanent structures rock back and forth.

In the Findings of Fact of the trial Court on this issue is one numbered 11, at page 24, continuing to page 25 in the Transcript. Such Finding of Fact, numbered 11, is a fact finding not to be set aside by the Appellate Court unless clearly erroneous (Rule 52 (a)).

### THE QUESTIONS PRESENTED

1. When a lower court has found specific exact findings of fact, has conducted the trial proceedings in open court, and heard the witnesses give testimony and observed their demeanor, is the Appellate Court bound not to disturb such fact findings except when they are clearly erroneous; or may it flout and disregard the facts found?

2. Does a Federal Appellate Court rightfully reverse a District Court, under the rules of Civil Procedure established by the Supreme Court of the United States, upon fact questions, where the facts found by the District Trial Court are not erroneous in any respect but are evidently true?

3. Is a District Court of the United States to be reversed by an Appellate Court, where the District Court has decided the case in strict accordance with the applicable decisions of the Supreme Court, and the Appellate Court, in reversing decides such case, not only probably, but inescapably in conflict with the applicable decisions of the Supreme Court of the United States.

### REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The question of infringement in a patent case seldom is anything but a question of fact. The Appellate Court should receive the fact determinations of the Dis-

trict Court which tried the case and heard the witnesses, as settled, unless they are clearly erroneous. This the Sixth Circuit Court of Appeals has not done in this case, but has disregarded Rule 52 (a) of the Civil Rules of Procedure adopted by the Supreme Court of the United States, pursuant to the Act of July 19, 1934, Chapter 651 (48 C. T. A. T. 1064).

2. The Rules of Civil Procedure for the District Courts of the United States have been in effect approximately 7 to 8 years. No previous case is known in which the Supreme Court of the United States has been called upon to interpret Rule 52 (a) of such Rules of Civil Procedure, and in its supervisory authority over the subordinate Federal Judiciary, define the limits of such rule and of how strictly it must be observed by Federal Appellate Courts, in not setting aside facts found by a trial District Court, unless they are clearly erroneous.

3. Fact finding 11 (Transcript page 24, 25) finds complete identity in operation, in mounting, in permanence and simplicity of structure, and in principle of operation, by substantial identity in structure, differing only in colorable departure in details of structure, without change in essential structure. It further finds that the structural development disclosed in patent No. 2,233,159 is appropriated in all essential respects. This fact finding the Sixth Circuit Court of Appeals has set aside, though clearly evident, and not erroneous.

4. The direct identity of the completed movable handle and lever, permanently assembled element of the patent in suit, and of the colorably changed infringing structure, as found by the District Court, is absolute and certain, and is *clearly evident*. The decision of the Circuit Court of Appeals for the Sixth Circuit, setting aside this evident fact found by the District Court is one calling strongly for correction; and for the direction of the Supreme Court of the United States that Rule 52(a) of the Rules of Civil Procedure shall not be thus disregarded but is binding on Circuit Court of Appeals.

5. The decision of the Sixth Circuit Court of Appeals should be reviewed and reversed because it is directly in conflict with the applicable decisions of this court, including:

*Sanitary Refrigerator Co. v. Winters et al, etc.*  
280 U. S. 30; 50 S. Ct. 9;  
*Burr v. Duryee*, 1 Wall. 531; 17 L. Ed. 650;  
*Union Paper Bag Mach. Co. v. Murphy*, 97 U. S.  
120; 24 L. Ed. 935;  
*Elizabeth v. Pavement Co.*, 97 U. S. 126; 24 L.  
Ed. 1000;  
*McCormick v. Talcott*, 20 How. 402; 15 L. Ed.  
930;  
*Ives v. Hamilton*, 92 U. S. 426; 23 L. Ed. 494;  
and many others.

6. The decision of the Sixth Circuit Court of Appeals in this case should be reviewed and reversed because there is infringement in the present case, because there is no substantial departure from the patent, but a mere colorable departure in minor detail, therefrom making identity and infringement, *Sanitary Refrigerator Co. v. Winters et al supra*. The principle applies to all patents, even of a restricted scope where any departure is of a merely colorable nature, which the District Court found as a finding of fact. There is no substantial departure; and the two devices (that of the Crampton patent and that of the Respondent) do the same work in substantially the same way and accomplish identically the same results, by identical structure. The infringer takes the whole gist of the invention in this case.

WHEREFOR, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Court, directed to the United States Court of Appeals for the Sixth Judicial Circuit, commanding said Court to certify and send to this Court, on a date to be designated, a full Transcript of the Record and all proceedings of the Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court, as to the questions herein presented, and

that the judgment of the Court of Appeals for the Sixth Judicial Circuit be reversed insofar as it found no infringement of claims 11, 12 and 13 of the Crampton patent No. 2,233,159, and that the petitioner may be granted such other and further relief as may seem proper.

Respectfully submitted,

BASIL R. CRAMPTON,  
BY FRANK E. LIVERANCE, JR.,  
*Counsel for Petitioner.*





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**BRIEF IN SUPPORT OF PETITION FOR CERTIORARI**

**I**

**THE OPINION OF THE COURT BELOW**

The opinion for the Circuit Court of Appeals for the Sixth Circuit has not at the time of writing been reported in the Federal Reporter. It was filed January 28, 1946 and is reported in 68 *U.SP.Q.* 122. It is in the Transcript, page 184-192.

**II.**

**JURISDICTION**

The date of the judgment to be reviewed is January 28, 1946 (Trans. 183); rehearing denied March 11, 1946 (Trans. 209). The jurisdiction of the Supreme Court in this case is invoked under section 240-a of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C. 347); and under section 5(b) of Rule 38 of the Supreme Court.

## III.

## STATEMENT OF THE CASE

A brief and summary statement of the facts of the case and of the subject matter involved is set forth in the petition for ceriorari. Some further amplification is thought desirable.

The validity of the claims in question — 11, 12 and 13 of the Crampton patent #2,233,159 (Trans. 148) is not a question herein. The patent was held valid by the District Court and expressly held valid by the Circuit Court of Appeals for the Sixth Circuit by a majority of the court; and the other Judge did not deny the validity but, in a dissenting opinion, contended that such Circuit Court of Appeals for the Sixth Circuit should not decide the validity question, but solely the question of infringement (Trans. 191-192).

The District Court held such claims 11, 12 and 13 infringed, basing such decision of infringement, as stated in his opinion (Trans. 19, 20), upon controlling facts as established by the record which were filed simultaneously with his opinion (Trans. 21 to 26).

Lack of identity of the structure, which is a subject matter of the patent, as defined in its claims 11, 12 and 13 and of the respondent's like structure was asserted by the respondent in its appeal, and its contention was sustained by the Circuit Court of Appeals for the Sixth Circuit, upon two *differing methods of assembly of the parts* in the patented structure (Trans. 148); not upon any lack of identity of the *completed structures as defined* by such claims 11, 12 and 13.

The rocking member of the flushing tank lever of the patent has an outside handle 7, an inside arm 5, known in the trade as the "lift arm", and a transverse connecting member 18 between the handle and the lift arm, all permanently secured together. On the part between the outside handle and the inside lift arm, the tank wall mounting fixture or spud 8 is located. When the structure is assembled, such handle-lever assembly is as though it was a *single*

*integral part* from one end of it to the other. But to get the spud in its place of location, with the transverse member 18 extending through it, such assembled rocking lever member is divided between its ends and made initially in two parts. The Crampton patent makes the handle as one part and makes the inside lift arm 5 and the transverse portion 18 which passes through the spud, as another part, from a bar of metal which is bent between its ends to make the two parts 5 and 18, one substantially at right angles to the other. The spud 8 is passed over the free end of the laterally bent extension 18 in Crampton, and then a *permanent*, normally unbreakable connection of the handle to the end of such extension 18 is made. This normally permanent connection is one which can be broken only by the application of a force sufficient to disrupt the metal of the handle where it is suaged into the notch 231 near the end of such extension 18, and overcoming its molecular cohesion, the same as any integral member of metal or other material can be disrupted only by pulling it apart and overcoming the cohesion with which the molecules of the material are attracted to each other.

In other words a durable, *permanent* handle and lever assembly is made which under all normal service, or abusive service to which it may be subjected, remains constant, as no force sufficient to disrupt the cohesion of the metal will ever be applied in its use. *It is, in every effect, integral.*

The respondent's lever made as disclosed in the patent to Pleasant, et al (Trans. 160-e) mounts the wall connected spud 21 on a cross connecting member between an outside handle and an inside lift arm. The handle is at 27 in Pleasant, et al, the inside lift arm at 15 and the cross connecting member has applied to it the reference numerals 33, 35; called in the Pleasant patent, a "spindle".

Such cross connecting member in Pleasant is cast integral with the handle and not with the lift arm. The spud is placed on it by slipping over it at its free end and the inside lift arm 15 is permanently and so securely connected with the part numbered 33, 35 that it will never separate under use and can be separated only by a force

which will disrupt and overcome the molecular cohesion of the metal, just like any integral structure is disrupted into two or more parts by force which will overcome the attractive cohesive force of the molecules to each other. Again, *in every effect, integral.*

In other words, there is a difference *in assembly*. Inasmuch as this completed lever member, having an outside handle and an inside lift arm and a cross connecting member, has to have the spud located with a cross connecting member extending through it, initially the completed handle lever members in both the patent and respondent's accused structure are made in two parts, so as to leave a free end of the cross connecting member over which to slip the spud; and thereafter, permanently inseparable and, in effect, integrally connect the parts so that they will be identical in all structural, operative and functional aspects when such permanent connection is made.

The Crampton patent slips the spud over one end of the cross connecting member and the Pleasant patent over the other end. Assembled, they are both off-set levers each with a spud located around the transverse connecting portion, making a rocking lever of the first class which rocks in the spud, both being the same as though integral from one end to the other.

Such is the difference and the only difference, not in completed structure as claimed, but in the method of making and assembly, which the lower court found, as an express fact finding, was merely a colorable difference, attaining identically the same objects the same way; as it obviously does.

For the findings of fact, the one numbered 11 (Trans. 24, 25) states as follows:

"The levers of the patent and of the defendants manufacture are each initially made of two parts which are permanently and rigidly secured together after the spud member has been mounted on one of the parts."

And earlier in such finding it is stated:

“The construction of tank lever as manufactured and sold by the defendant, (see exhibit 1 and 2) is substantially identical with the structure disclosed in the patent in suit, differing only in colorable departure in details of structure without change in essential structure.”

It is this finding of fact 11, clearly evident, not erroneous, but indisputably correct, that the Appellant Court ignored and in so doing violated Rule 52(a) of the Civil Procedure rules, established and ordered by the Supreme Court of the United States to be observed by Federal Circuit Courts of Appeals.

#### IV.

#### SPECIFICATION OF ERRORS

In the following particulars, it is submitted that the Circuit Court of Appeals for the Sixth Circuit erred:

1. In disregarding and failing to observe rule 52(a) of the rules of Civil Procedure established by the Supreme Court of the United States, which requires that the findings of fact of the United States District Court shall not be set aside unless clearly erroneous.

2. In finding no infringement of claims 11, 12 and 13 of the Crampton patent in suit, found by the District Court as its finding of fact No. 12 (Trans. 25).

3. In misdescribing the prior art and stating that the respondent's flush tank lever was more similar to it than to Crampton.

4. In wholly disregarding the substantial identity in structure, with only colorable departure in details of structure and method of assembly, without change in essential structure, disregarding identity in operation, identity in mounting, identity in permanence and simplicity of structure, identity in beneficial results obtained by the defendant by structural means,

identical structurally in a legal sense with the petitioner's patent, as clearly and expressly found by the District Trial Court as findings of fact.

5. In failing to follow and conform to the applicable decisions of the Supreme Court by which this question of infringement is controlled, but deciding the question of infringement in the way not only *probably* in conflict with the applicable decisions of the Supreme Court, but *certainly and definitely* in conflict with such applicable decisions.

6. In reaching the decision which it did by a species of deceptive and subtle argumentation and reasoning, contrary to all of the applicable decisions of the Supreme Court.

7. In ignoring direct and inescapable equivalency in every respect of the permanent, and in effect, integral structures of the rocking lever and handle member assemblies, such equivalency being admitted by the respondent's expert and major witness (Trans. 108-9).

## V.

### ARGUMENT

#### Validity

The question of validity is not one at issue in this case. The lower Court (Trans. 19) in its opinion, after referring to the findings simultaneously filed, stated that the prompt and practically complete abandonment by practically all competitors of the field far transcend the usual conceptions of commercial success, and that a substantial advance in a crowded art had been successfully attained by the plaintiff (petitioner herein) which was immediately recognized; and that the virtues of simplicity, durability, compactness, ease of mounting, and economy of production were very substantially advanced over the prior art. The Sixth Circuit Court of Appeals (Trans. 187), referring to the fact that the trial Court found that the Crampton patent was of a "simple, strong, durable

permanent construction, which Theleen is not", then stated "Crampton certainly achieved tremendous commercial success". It expressly held that claims 11, 12, 13 must be sustained as valid claims (Trans. 188). The appellate Court also held that "Crampton had achieved simplicity, compactness, sturdiness, and ready mountability" (Trans. 190), as the result of improvements in an old art; that further he was entitled to a limited range of equivalents.

### The Question

The question then becomes, whether or not the District Court, on unassailable true fact findings, rightly arrived at a finding of infringement under the applicable controlling decisions of the Supreme Court, and whether or not such claims 11, 12 and 13 are adequate, (Fact finding 12, Trans. 25), under a limited range of equivalents, to comprehend the substantially structurally identical respondent's lever, and one certainly structurally identical in a legal sense, achieving wholly identical beneficial results, in the same way by the same principles of operation.

The patent in question is a valid patent, sustained valid by both of the lower Courts.

### The Decision of the Sixth Circuit Court of Appeals on Infringement.

The Appellate Court said Crampton was entitled to a limited range of equipments. It then held that the disclosure of the Crampton patent showed a lever 5 and a lateral extension 18 thereto in one piece, said extension passing through the base or spud member 8 and, thereafter, in the assembly, the handle at the outside was secured to the free end of said extension. He had eliminated entirely (so it was held) the "spindle" arrangement of the accused device, which connects with the part 15 which the Pleasant et al patent description (Trans. 160-2) called a "lever"; and that it was this "spindle" device to actuate said "lever" from the inside of the tank that the Court for the Sixth C. C. A. relied upon. Obviously here is glaring error, a play upon words and an ignoring of substance.

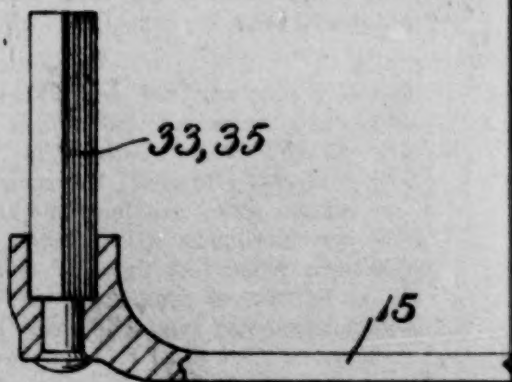
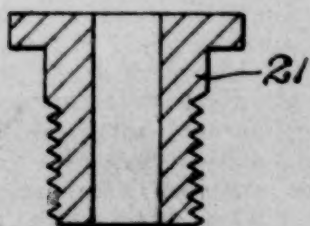
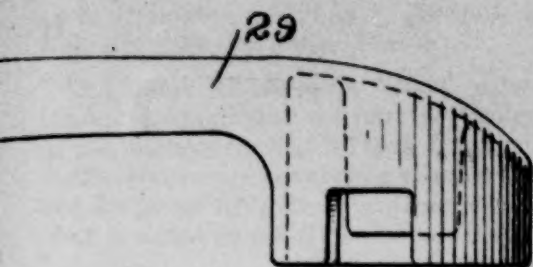
We call attention to the accompanying sketch, the lowest figure, showing the inside part 15, called "lever" in the patent to Pleasant et al, a lift arm, like 5 in Crampton, in its permanent connection with the part 33, 35, called a "spindle" in the Pleasant patent, the "extension" 18 in Crampton, with the handle 29 (in the upper figure) not attached. If this lowest figure structure is not the lever of Crampton consisting of the inside lift arm 5 and the extension 18, then what is? If such structure does not conform expressly and literally to claims 11, 12 and 13, defining that "the base (21) receives the lever" and that "the handle" (7) is mounted on the base exteriorly of the tank wall, and the handle is *permanently* secured to the lever", it is impossible to understand plain words of the English language.

The handle 29 of the Pleasant patent is exterior of the wall, is mounted on the base, and is integrally, therefore, *permanently* connected with this lateral "spindle" extension 33, 35 to the lever.

It is the position of the Appellate Court that the claims 11, 12 and 13 did not read *literally* upon the accused construction in that the claims define the base as rotatably receiving the lever and limiting its movement. As a fact they do; but when did bare, narrow literalism, for patent protection destruction come into being?

The Appellate Court by ignoring substance and operating upon a destructive play of words said that, as the part called "lever", at 15 in the Pleasant patent did not extend through the base, it was not rotatably received by the base and its rotation limited thereby.

The Circuit Court of Appeals ignored every principle of the law of patents covering the matter of divided and integral parts; that any two parts, where permanently and rigidly secured together are the same thing as integral and are so treated. Certainly the part called "lever" numbered 15 and the part 33, 35 in Pleasant et al (Trans. 160-e) called "spindle", are permanently, inseparably, and rigidly connected, and make exactly the same thing as the integral lever arm 5 and its extension





18 in Crampton. *Nathan v. Howard*, 143 Fed. 889, 892 (6th Cir. 1906, by Judge Lurton).

The Court of Appeals below, says in its decision, Crampton eliminated entirely the "spindle" arrangement of the accused device. There is an apparent idea that if this transverse connecting member between the handle and the inside lift arm, 18 in Crampton; 33, 35 in Pleasant et al, is called by a different name, that makes it different.

The English language is rich in words so that mechanical elements may have applied a large number of differing names, each meaning the same when applied to a particular structure. Indeed in the Theleen patent (Trans 148-b), showing an inside lift arm 5 and a lateral extension 6, such part 6 in Theleen is named, an "off-set rock shaft portion". Such designation of this part of flushing tank levers passing through the wall mounting fixtures or spuds is the best designation of all. Crampton has such "rock shaft portion" in his "extension" 18. The respondent's structure has its off-set "rock shaft portion" to his inside part 5 in the "spindle" 33, 35.

The claims 11, 12 and 13 do read literally on the respondent's structure giving them the meaning which they have, predicated upon the disclosure of the Crampton patent.

In the Crampton patent (Trans. 148) the part 5 at one end has a permanently connected "extension", or "off-set rock shaft portion", or "spindle" 18. The parts 5 and 18 are so securely connected (integral) that they will not break apart under any normal use. The handle outside, numbered 7, is permanently connected to this "lever", the lever passing through and being rotatably received in the base. The permanent connection is so sure and secure that no breaking apart can occur under any normal circumstances.

It is our understanding that this Court has expressly stated in *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 52 L. Ed. 1122 at p-1128, that,

"an inventor must describe what *he conceives to be the best mode*, but he is not confined to that. If this were not so, most patents would be of little worth".

Crampton disclosed and described what he conceived to be the best mode of embodying his invention. He did not create or invent the separation of the handle-rocking lever of a flush tank into two parts. It had been done in two ways before. One was like Theleen, (Trans. 148-b) in which a rod was bent to make a lateral extension or "off-set rock shaft portion", the handle being initially separate and never permanently connected. The other was like the several patents mentioned by the Court of Appeals in its decision, Davis, McNeil, Kirk and Clemons, in the Transcript, respectively, at pages 160-a, 160-b, 160-c, 160-d. In these a handle with an integral "spindle", which was to extend through the tank wall fixture or spud, and be an "off-set rock shaft portion" of the assembled lever, was detachably connected to an inside lift lever arm, initially formed separate, and never permanently connected.

Thus, the mounting of the spud on the rock shaft portion of the movable lever member had already been accomplished in the two ways: by slipping said spud over the free end of a "rock shaft portion" integral with the inside lift arm or over the free end of a "rock shaft portion" connected with the handle.

Crampton used the first as best in his estimation, and used normal English words to describe it. He showed one specific form as his best mode, as required by statute, but "he is not confined to that".

Crampton's invention improved these old levers. For the old levers were not *permanent* in connection, were not simple, were not made of the fewest number of parts, the base did not limit the lever rocking movement, they were not compact or rigid and durable, but were made of separable parts which were detachably connected together upon the assembly *on the tank*, as in Davis, Kirk, McNeil and Clemons; or which, if put together as in Theleen be-

fore mounting on the tank, readily come apart, the screw connected handle working loose with resultant damage. Theleen was ineffective and inefficient so that, as found, though it was put on the market by a well established and still operating manufacturer of plumber's supplies, it was withdrawn to be replaced by another which Crampton supplanted, and fell into "disuse" long before the time of Crampton (Trans. page 20).

Crampton, by his invention achieved the greatest simplicity ("simplicity is the highest form of invention"), compactness, durability, and economy in manufacture to a far greater degree than any earlier, such that he supplanted and superseded all others, because his lever consisting of the inside lift arm 5 and its rock shaft portion 18 and his outside handle were *PERMANENTLY* connected together to make an *integral* lever rocking member in every purpose and effect. Permanence of assembly insured durability.

The respondent's structure (Pleasant et al patent Trans. 160-e) gets a like simple, durable, compact, economical structure and unit ease of mounting by having the part 15 with its permanently connected (in substance integral) off-set rock shaft portion 33, 35, and handle permanently (integrally) attached to the outer end of the rock shaft to make identically the same simple, strong, durable, economically constructed, identical unit mounted tank lever.

Briefly, referring to the case of the Sixth C. C. A. on which it relies, *D'Arcy v. Marshall*, the facts were entirely different, the conditions entirely different, the limitation in the claim in D'Arcy had nothing to do with old environment, but was to a novel inventive step which greatly improved an old environment and imported very substantial beneficial results.

In the present case, the environment to which the invention is applied was old, in *two* old forms. The durability, compactness and simplicity of structure and of mounting, including economy and smallest number of parts, came from the permanent connection of the two

parts of the old rocking lever members such permanent connecting being where they were initially divided, in order to mount the spud. Such permanent connection had never been made previously. There was available, for application of the invention to both, two old environments, and the structures when completed, using either of the two old environments, were the same. The fact findings of the District Court so state.

Brief mention will be made only of the other portions of said claims 11, 12 and 13, because obviously everything else is identical. Such claims, expressly held valid by both lower Courts, were distinguished only on the part of the Appellate Court by an attempted, narrow, falsely literal reading of the clause "said base rotatably receiving and limiting the extent of rotation of said lever".

Said base is the *spud*. The lever in Crampton is the inside lift arm 5 and its rock shaft portion or "extension" 18 going through the spud.

In the respondent's structure, said lever is the inside lift arm 15 and its permanently, rigidly secured, in substance integrally connected off-set rock shaft 33, 35, which does go through and is rotatably received by the base or spud; but which the Appellate Court said was a "*spindle*", which Crampton did not have.

It is so obvious that the finding by the Sixth Circuit Court is erroneous that little need or should be further said. It is a fact finding of the 6th C. C. A., itself clearly erroneous, which sets aside the true findings of the District Court.

**The Sixth C.C.A. Has Decided Contrary to the Applicable Decisions of this Court.**

A very closely parallel case is that of *Sanitary Refrigerator Co. v. Winters, et al etc.*, 280 U. S. 30, 50 S. Ct. 9.

The invention in such case, a refrigerator latch, was in a crowded art, and not a pioneer patent entitled to

any broad range of equivalents, but was meritorious and soon attained a large measure of success. The infringing latch transposed some parts, making reciprocal changes in the form of the disclosure of the Winters and Crampton latch structure, but attained the same objects, was a close copy using the substance of the invention, and performed precisely the same offices in the same way with no change in principle. (In passing, it may be stated that the claims, which the Supreme Court held were infringed, were *not* "literally" applicable to the infringing structure). The Supreme Court upon the authority of *Burr v. Duryee*, 1 Wall. 531, 573, 17 L. Ed. 650; *Union Paper Bag Machine Co. v. Murphy*, 97 U. S. 120, 125, 24 L. Ed. 935; *Elizabeth v. Pavement Co.*, 97 U. S. 126, 137, 24 L. Ed. 1000; *McCormick v. Talcott*, 20 How. 402, 405, 15 L. Ed. 930; and *Ives v. Hamilton*, 92 U. S. 426, 23 L. Ed. 494, held there was infringement, as a close copy seeking to use the substance of the invention, showing some change in form or position, using substantially the same devices, performing precisely the same offices with no change in principle; and while there were some minor differences in form and structure, the variation made did not change it from being in substance, the same thing as the patented structure, and as mere colorable departures, that did not avoid infringement. We could refer to numerous other cases establishing the principles stated which have always held in the patent law.

The lower Court herein as a fact finding found there was mere colorable departure in minor detail of structure. Such colorable departure consisted obviously only in dividing the eventually completed, permanent, integral-in-effect, rocking lever member at a different point; at the opposite end of the rock shaft portion so as to pass through the base or spud. It would thus pass, both forms being old. But there was a permanent connecting of the initially divided parts, so that they were permanently secured, were durable and simply constructed, compact, unit installed and economical to make, exactly as in the patent in issue, making the same structure.

*If the Court of Appeals for the Sixth Circuit did not deliberately set aside such certain and true findings of fact of the lower court, it then must have obviously (not probably) decided this case in conflict with the applicable decisions of the Supreme Court.*

The Sixth C.C.A. agreed there was a limited range of equivalents due the petitioner's patent. The Supreme Court in the cited case of *Sanitary Refrigerator Co. v. Winters, etc. supra*, expressly held that the Winters and Crampton patent, there considered was a narrow patent, having a limited range of equivalents; but the same substantive structure, identical in a legal sense, having every part cooperating in exactly the same way, getting the same functions, serving the same offices, no more and no less, spelled infringement, even though, as this Court held in the Sanitary Refrigerator case, the invention therein must be restricted to the form shown and described by the patentee, and could not be extended to embrace a new form which is a substantial departure therefrom. It then further expressly held:

"It is nevertheless infringed by a device in which there is no substantial departure from the description in the patent, but a mere colorable departure therefrom."

## CONCLUSION

We are aware that granting a petition for certiorari is not a matter of legal right. We are aware that in a case where there can be sincere debate upon the soundness of the decision of a Circuit Court of Appeals the petition is seldom granted. If this was such a case this petition would not be filed.

We take it that the provisions of Rule 38 of the Supreme Court of the United States in its sub-division (5) means what it says, namely, that such writs may be granted when a federal question "has been decided in a way probably in conflict with applicable decisions of this Court."

We do not base this petition and ask for this writ upon *probability* of conflict with the applicable decisions of this

court. We base it upon *indisputable conflict* with the applicable decisions.

We further submit that this writ of certiorari should be granted because of violent non-observance of Rule 52(a) of the Civil Rules of Procedure. As a matter of wide and generally important interest, the Circuit Courts of Appeals of this country should be informed and directed with respect to such rule and that it is to be observed.

. . .

We are further aware and conscious of a widespread feeling, the country over, that a patent is something disreputable, a *monoply*, and that the patent owner should be considered as a to-be-reviled "monopolist", and everything possible used as a weapon against patents; wholly contrary to that liberal treatment of patent property so universally held to be the rule by the Supreme Court, when a meritorious advance has been made. *Eibel Process Co. v. Minnesota and Ontario Paper Co.*, 43 S. Ct., 322; 261 U. S. 45.

We think this has resulted to a large degree from a very mistaken view, by many, of the Supreme Court decisions of the last decade, in which the property *exclusion*, granted by a patent (such "exclusion" is inherent in all property), has been properly restricted and defined to what it actually is, and the owner of the patent has been held within the limits of his property and not permitted to unlawfully extend beyond the rightful boundaries which it has. Actual monopoly can be based upon misuse of any property; which is not to be considered as an evil of *property*, but an evil of those who use property in an indefensible manner. But even as the familiar quotation, "The love of money is the root of all evil" is so frequently misstated as "money is the root of all evil", so the slanderously inaccurate are prone to ascribe evil to any property itself, where it is evilly used. We think an actual analysis of the late Supreme Court decisions, in connection with patent property, shows a check upon the abuse of such property by those graspingly minded, and that the actual and real property right, namely, the right of exclusion which a *valid* patent

has, has not been held by this court in any respect as in itself evil and odiously monopolistic. (Both lower Courts have held the Crampton patent herein *valid*).

Indeed, to do so would very greatly encourage those of the collectivist school of thought, who would like to have the *exclusion* which any and all property has, be held as evil, for the furtherance of their economic beliefs and aims. Referring to another species of property, real estate, the owner has *exclusive* possession, has the remedy of ejectment against anyone who wrongfully possesses it, (analogous to the injunction in patent suits), and has the remedy of damages for trespass (analogous to the accounting for patent property trespass). And, if a patent owner is to be a to-be-reviled monopolist, so is the owner of real estate or any other property; with which the collectivist will enthusiastically agree. Attack patent property today as monopolistic because it excludes non-owners and others having no rights thereunder, succeed in its substantial destruction. Then, tomorrow attack real or other property as monopolistic, because, similarly excluding non-owners and such others having no rights thereto, succeed at that, and the collectivist will be victorious all along the line.

The statement of Mr. E. R. Weidlein, Director, Mellon Institute of Industrial Research, appearing at page 81 in the February, 1946 issue of the Journal of the Patent Office Society, is illuminating. It says:

“Much has been said both for and against the operations of the patent system in recent years. Its most vociferous opponents have been those who are not only completely unfamiliar with the internal operations of modern competitive industry, *but are loudly unsympathetic with the economic system by which our country has attained its present position of eminence.* The patent system has thus become something of a *focal point for sustained attack on private enterprise as a whole*”.

As a support for the view that a great deal of popular and, in some cases, judicial beliefs (*Hoffman v. Berger, et al.*, 18 F. Supp. 632, at p. 634) that the Supreme Court

is strongly antagonistic to the property rights of patents (dubbed "monopolies") established by the Constitution of the United States, is wrong, the cases, *Goodyear v. Ray-O-Vac Co.*, 321 U. S. 275, and *Williams Mfg. Co. v. United States Machinery Corp.*, 316 U. S. 364, 62 S. Ct. 1179 are recent cases of this Court which deny such erroneous concept.

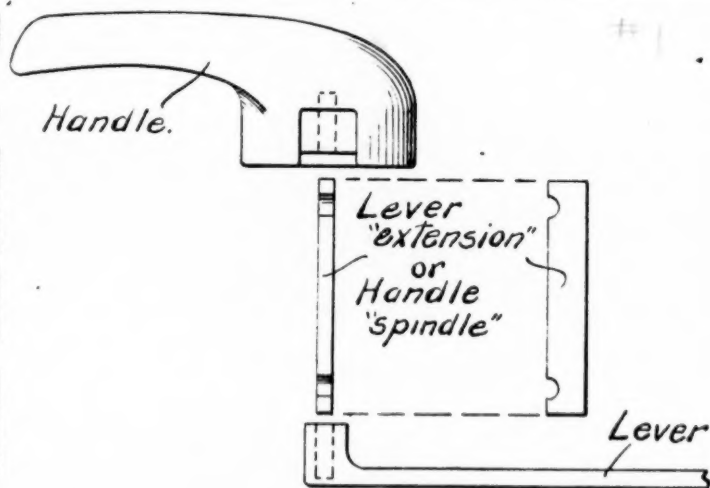
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It is, therefore, respectfully submitted that this case is one obviously calling for the exercise by this Court of its supervisory powers to direct Circuit Courts of Appeals as to their observance of Rule 52(a) of the Civil Rules of Procedure; and in order that gross injustice may be corrected, which injustice has been perpetrated by deciding, not "probably" in conflict with the applicable decisions of this Court, but in *clearly evident* and *definite* conflict with such decisions; and that, a writ of certiorari should be granted and this Court should review and reverse the decision of the Court of Appeals for the Sixth Circuit as to its holding of non-infringement of claims 11, 12 and 13 of the Crampton patent in issue.

Respectfully submitted,

FRANK E. LIVERANCE, JR.,  
*Counsel for Petitioner.*

Grand Rapids, Michigan.  
March 15, 1946.

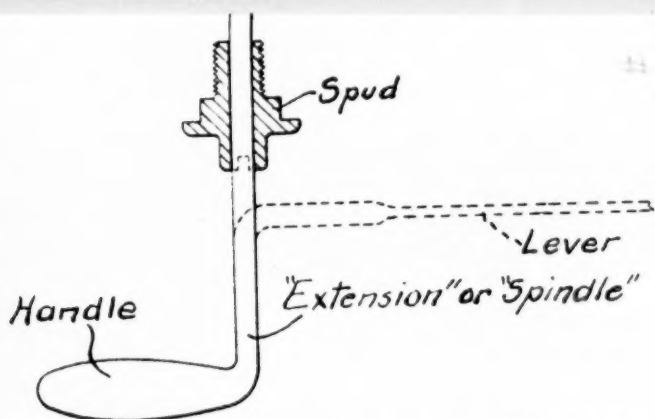


*A rocking handle and lever assembly initially in three parts*

*If the "extension" or "spindle" was first permanently connected at one <sup>end</sup> to the lever; the spud put over it, and the handle then permanently secured at the other end, as Crampton does in assembling, would that be infringement?*

*If the "spindle" was first permanently secured at one end to the handle, the spud put over it, and the lever then permanently secured at the other end, as Pleasant et al does, would that be no infringement, in accord with the decision of the Sixth C. C. R.?*

*If the spud was put over the "extension" or "spindle", and the handle and lever permanently secured simultaneously at its opposed ends, what would it be?*



A rocking lever and handle made from a single rod length.

The rod, near one end, has a section bent at right angles and pressed and shaped into a handle. The spud is slipped over the other end of the rod nearly to the handle. The rod is then bent to the dotted line position as shown. Lever, the "spindle" or "extension" or "off-set rock shaft portion," and handle are literally integral.

Is the part between the lever and handle, an "extension" to the lever, or a "spindle" integral with the handle; in the first case an infringement, and in the second not infringing?

Or, is sophistry in word or name manipulation to be discarded, and substantial identity in structure rule infringement?



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APR 24 1946

CHARLES ELMORE DROPLEY  
CLERK

IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1945

\_\_\_\_\_  
No. 1154  
\_\_\_\_\_

BASIL R. CRAMPTON,

*Petitioner,*

VS.

CRAMPTON MANUFACTURING CO.,

*Respondent.*

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**RESPONDENT'S BRIEF OPPOSING PETITION  
FOR WRIT OF CERTIORARI.**

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**RESPONDENT'S BRIEF OPPOSING PETITION  
FOR WRIT OF CERTIORARI.**

*To the Honorable the Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

There are no "special and important reasons" for a review on writ of certiorari,—certainly none of the character exemplified in Rule 38, paragraph 5 (a), (b) or (c), nor any reason concerned with the public interest in the controversy. Indeed, the public is benefited by having respondent's device freed from the monopoly of petitioner's patent. Thus the public gains by continued enjoyment of the fruits of *respondent's* promotion of progress in the art instead of having to await the expiration of petitioner's patent before being able to do so.

The burden of petitioner's song is that the Court of Appeals violated Civil Procedure Rule 52(a) Perhaps he

seeks to develop some such reason for review as the one expressed in 5(b) of Supreme Court Rule 38 where it reads "so far departed from the accepted and usual course of judicial proceedings \* \* \* as to call for an exercise of this court's power of review". But surely there was no such departure by the Court of Appeals in the instant case when it held that the fact-finding No. 11 of the District Court, upon which petitioner stands, was clearly erroneous.

It follows that no such question arises as the one put at page 5 of the petition,—“may it [Appellate Court] flout and disregard the facts found?”

We understand that this Court is not ordinarily interested in purely factual issues, and there is nothing at all unusual or exceptional in that respect about the course that the case at bar has taken. Indeed, the underlying facts of the case are not in dispute. The only controversial fact-issue, if it can properly be called such, is whether the claim-language excludes the accused structure.

The situation is simply this: The finding in question was authored by petitioner's attorney to support his theory of response to the claims by the accused device. That theory was rejected by the Court of Appeals. As in most patent cases, the issue of infringement turned upon the *scope* of the claims, which, in the instant case, contain recitals held by the Court of Appeals not to be applicable to the accused device. The District Court had found that they were. The Court of Appeals held that such finding was clearly erroneous, and that the petitioner, as an improver, was only entitled to a narrow range of equivalents which did not embrace respondent's separately patented device.

Obviously such situation suggests no reason whatever for exercise by this Court of its powers of review.

If the situation was the reverse, then there might well be reason for review, having regard to the public's not being

foreclosed from profiting by promotion of the art at the hands of *respondent*. The inconsistency referred to in *Directoplate Corp. v. Donaldson Lithographic Co.*, 51 F. 2d 199, C.C.A. 6th (cited and quoted from in the opinion of the Court of Appeals), citing *Claude Neon Lights v. E. Machlett & Son*, 36 F. 2d 574, C.C.A. 2d, as "between application of the doctrine of equivalents and of the doctrine that the claim and that alone must measure the monopoly", might very likely have supplied a reason for review.

As it is, the instant opinion very properly applied the doctrine that "the claim and that alone must measure the monopoly". Surely this suggests no reason for review.

The inconsistent doctrine had its origin in *Winans v. Denmead*, 15 How. 343, "over a strong dissent", as stated in *Claude Neon Lights v. E. Machlett & Son*, *supra*, and it is interesting to note that the dissenting opinion (concurred in by three others of the Justices) concluded with the statement "the principles of legal interpretations *as well as the public interest*, require that this language of this statute shall have its full significance and import" (emphasis supplied),—referring to language of the then statute which ran similarly to that of the present statute as to how the applicant for a patent "shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery."

It is interesting to note that this Court quite recently gave recognition to that dissenting opinion,—in *Cuno Engineering Co. v. Automatic Devices Corp.*, 314 U. S. 84, 92.

The crux of the matter in the instant case is that each of the claims that was upheld but found not to have been infringed, particularized as follows:

"\* \* \* said base rotatably *receiving* and limiting the degree of rotation of said lever" (emphasis supplied).

As to this, the opinion of the Court of Appeals, reads (Tr. 189):

“Each of claims 11, 12 and 13 expressly states, among other things, that the base receives the lever.”

In the accused construction the base does not receive the lever, and so the opinion states, after further reference to recitals of the claims (Tr. 189):

“The chief difficulty with this is that the claims do not read literally upon the accused construction.”

The opinion goes on as to resemblance of the accused construction to prior art, and how it solved “a problem not met with either in Crampton [petitioner] or in the prior art”.

Later on the opinion refers to Crampton's departure from teachings of that prior art, as follows (Tr. 190):

“He thus eliminates entirely the ‘spindle’ arrangement of the accused device which connects with the lever and actuates it from the inside of the tank.”

Such an arrangement was borrowed *by respondent* from the prior art to which the opinion had alluded as bearing resemblance to the accused device (Tr. 189-190). The circumstance that respondent's inventors converted the prior art construction into one which would reach the same *result* as did petitioner's, surely does not itself make for infringement of the latter's claims,—particularly when each of them is specific to a different character and arrangement of handle, lever, and base from that of the prior art in question.

Added to this there is the significant fact that Crampton was not the first to devise a construction providing for permanent pre-assembly of handle, lever and base, to be mountable as a unit upon the tank. He was preceded by Theleen (patent No. 1,147,764 Tr. p. 148<sup>b</sup> Tr.), whose type

of handle, lever and base arrangement, which was different from that of the prior art hereinbefore referred to, Crampton improved upon.

The situation simply is that Crampton and respondent's inventors Pleasant *et al.* were *independent improvers upon different types of prior art*, each entitled to claim his own specific construction,—with no more than a very narrow range of equivalents permissible. And so it follows that Crampton, as the prior improver, has no status entitling his claims to dominate respondent's separately patented device (Pleasant *et al.* patent No. 2,313,840, Tr. p. 160°).

The opinion recognizes that "Crampton is entitled to a limited range of equivalents", but goes on to state (Tr. 190) that

"it must be kept in mind that in his claims he has limited himself to the form, location and functions of his handle, base and lever."

A little later on the opinion reads (Tr. 190):

"In the specification he refers to it as a suitable handle which actuates the lever from the *exterior* of the tank, the mounting of which on the said actuating lever constitutes one feature of the present invention." (Emphasis supplied). See page 1 of the Crampton specification, line 14, second column, (Tr. p. 148).

This completely disposes of petitioner's contention that his claims read upon the accused construction, which does not have that feature at all, since it directly concerns the claim recital of lever being received by the base connoting that the lever extends to the *exterior* of the tank.

There is nothing whatever to be derived from the specification of the patent in suit which is in any way suggestive of any other relationship, and certainly no indication of a concept such as that of respondent's inventors which is

portrayed in the Pleasant *et al.* patent and embodied in the accused structure.

We deem it unnecessary to reply to the petition and supporting brief *in extenso*, and so we shall simply make running comments on a few of the unwarranted statements therein:

1. At page 10 petitioner refers to a contention of respondent as having been sustained by the Circuit Court of Appeals for the Sixth Circuit "*upon two different methods of assembly of the parts in the patented structure*". Respondent advanced no such contention. The patent in suit describes only *one* method of assembling. Petitioner may have intended to refer to differing methods of assembly as between that described in the patent in suit and that practiced by respondent and described in *its* patent (Tr. 160°). But if petitioner means to say that the Court of Appeals found non-infringement upon that basis, and, as he says "*not upon any lack of identity of the completed structures*", he is in error. The opinion of the Court of Appeals does not particularly refer to the methods of assembling and, as shown by quotations hereinbefore made from the opinion, the conclusion of non-infringement *did* rest upon *contrast between the completed structures*, having particular regard to the call of the claims for a "*base rotatively receiving \* \* \* said lever*".

2. At page 14 of the petition error is assigned on the score of the Court of Appeals having reached its decision "*by a species of deceptive and subtle argumentation and reasoning*", and over on page 20 this is carried to the point of charging "*falsely literal reading of the clause 'said base rotatively receiving and limiting the extent of rotation of said lever'*". These aspersions are wholly unwarranted. The claims were dealt with just as they read and respondent's structure was found not to respond. If

anything "deceptive" or "subtle", or "a play upon words", appears it is rather to be found in petitioner's attempted reading of the claims upon the accused structure and in certain phrasing of Finding 11 which apparently misled the District Court. We refer to the statement in that finding that respondent's construction "provides a rockable lift lever mounted upon and extending through said wall fixture or spud", whereas it is not the lever that so extends but the integral spindle of the operating handle.

Petitioner chooses to disregard the fact that the claims set up the "flush tank actuating lever" as one distinct element, and the operating handle as another. In his perverse endeavor to apply the claims to respondent's structure he would have the actuating lever and operating handle *together* constitute the actuating lever of the claims. It is thus that he undertakes to justify the above-quoted phrasing of Finding 11, though he must of necessity recognize that, in respondent's structure, it is the spindle of the handle which extends through the spud, not the actuating lever which is wholly outside the spud.

3. At page 13 error is assigned "In mis-describing the prior art and stating that respondent's flush tank lever was more similar to it than to Crampton". Not only does the opinion below correctly describe the prior art in question, but petitioner's brief (p. 18) describes it in the same way. As to resemblances, the assigned error is an over-statement of what the opinion says upon the subject. Thus petitioner assigns error "In stating \* \* \* that respondent's flush tank lever was *more* similar to it [prior art] than to Crampton", (emphasis supplied) whereas the opinion reads (Tr. 189-190):

"But appellant forcefully points out that the accused construction had *as much* resemblance to four patents of the prior art \* \* \* as to Crampton." (Emphasis supplied.)

It is interesting to observe at this point that petitioner himself refers to these same four patents as showing "a handle with an integral 'spindle' which was to extend through the tank wall fixture or spud", wherein lies the resemblance to respondent's structure.

4. What was "admitted by the respondent's expert and major witness", as referred to in assigned error No. 7 at page 14, of the petition, was not at all an admission of equivalency between the *completed structure* of the patent in suit and respondent's *completed structure*. The witness testified that they were *not* mechanically equivalent to each other (Tr. 99-100). His admission, on cross-examination, as to equivalency, went merely to the matter of leverage *per se* when the lever and handle were integrated, and he pointed out on re-direct examination (Tr. 114) that the prior art Theleen patent (Tr. 148<sup>b</sup>) shows the same sort of leverage as the patent in suit.

Incidentally the disparagement of Theleen at page 19 of the petition is an over-statement. That device was not "ineffective and inefficient". See Frost testimony (Tr. pp. 74 to 84) which tells of the marketing of the Theleen device over a period of years and the reasons for its discontinuance.

5. The asseverations of structural identity, colorable difference and the like, repeatedly found in the petition and supporting brief, run counter to the judgment of the Patent Office as represented by the grant of a patent upon respondent's structure (Tr. 160<sup>e</sup>). Here it is interesting to note that the structure illustrated at the back of petitioner's brief on the right hand page (unnumbered) appears in a patent solicited by *petitioner* subsequent to the grant of the patent in suit<sup>#</sup>, notwithstanding which illuminating

<sup>#</sup> This subsequent patent No. 2,320,912 issued June 1, 1943, is not in the record of the case except as a copy of it was inserted in one of petitioner's briefs in the District Court. The illustration at the back of the petitioner's brief is a reproduction of Fig. 2 of the said patent.

circumstance, we find petitioner presenting this as another example of "substantial identity in structure" with what appears in the patent in suit!

This rather strikingly points up the aim of petitioner to blanket and throttle the art by founding so broad and far reaching a monopoly upon his first patent as to pre-empt the whole field so that the public must wait upon expiration of that patent before enjoying any benefit from subsequent inventions, except of course those of petitioner himself or those acquired by him.

### CONCLUSION.

No "federal question" has been decided in a way "indisputably" in conflict with applicable decisions of this Court, or "probably" so. What petitioner maintains in this regard appears to pertain to the venerable doctrine of mechanical equivalency, but that is always an open question for determination by the facts and circumstances of each particular case. Certainly no "indisputable conflict" arises out of an adjudication of non-equivalency of structures in one case, and an adjudication of equivalency of different structures in another case. As so well put by Judge Learned Hand in *Claude Neon Lights v. E. Machlett & Son*, *supra*:

"Each case is inevitably a matter of degree, as so often happens, and other decisions have little or no value. The usual ritual, which is so often repeated and which has so little meaning, that the same result must follow by substantially the same means, does not help much in application; it is no more than a way of stating the problem."

The opinion of the Court of Appeals in the instant case very properly determined the infringement issue by holding petitioner to the particulars of his invention as recited

in his claims, and, insofar as the question of equivalents was concerned, conceded "a limited range", but quite as properly ruled respondent's separately patented invention to be beyond that range. In so doing no "federal question" was decided "in a way probably in conflict with applicable decisions of this court",—simply because petitioner is able to cite instances of this Court's having applied the doctrine, as for example, in *Sanitary Refrigerator Co. v. Winters et al.*, 280 U. S. 30. In that case the accused device was found to be "substantially identical" with that of the patent in suit,—“the slight change in the form of” the accused device being “merely a colorable departure”, whereas in the instant case the Court of Appeals found substantial and material differences between the accused device and that of the patent in suit.

We submit that neither of the reasons advanced by petitioner for review by this Court is sound, and that the petition should therefore be denied.

Respectfully submitted,

FRANK PARKER DAVIS,

WM. CYRUS RICE,

*Attorneys for Respondent.*





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APR 24 1945

CHARLES CLARK CRAMPTON  
CLERK

IN THE  
SUPREME COURT OF THE  
UNITED STATES

October Term, 1945

No. 1154

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BASIL B. CRAMPTON,  
*Petitioner,*

vs.

CRAMPTON MANUFACTURING COMPANY,  
*Respondent.*

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF

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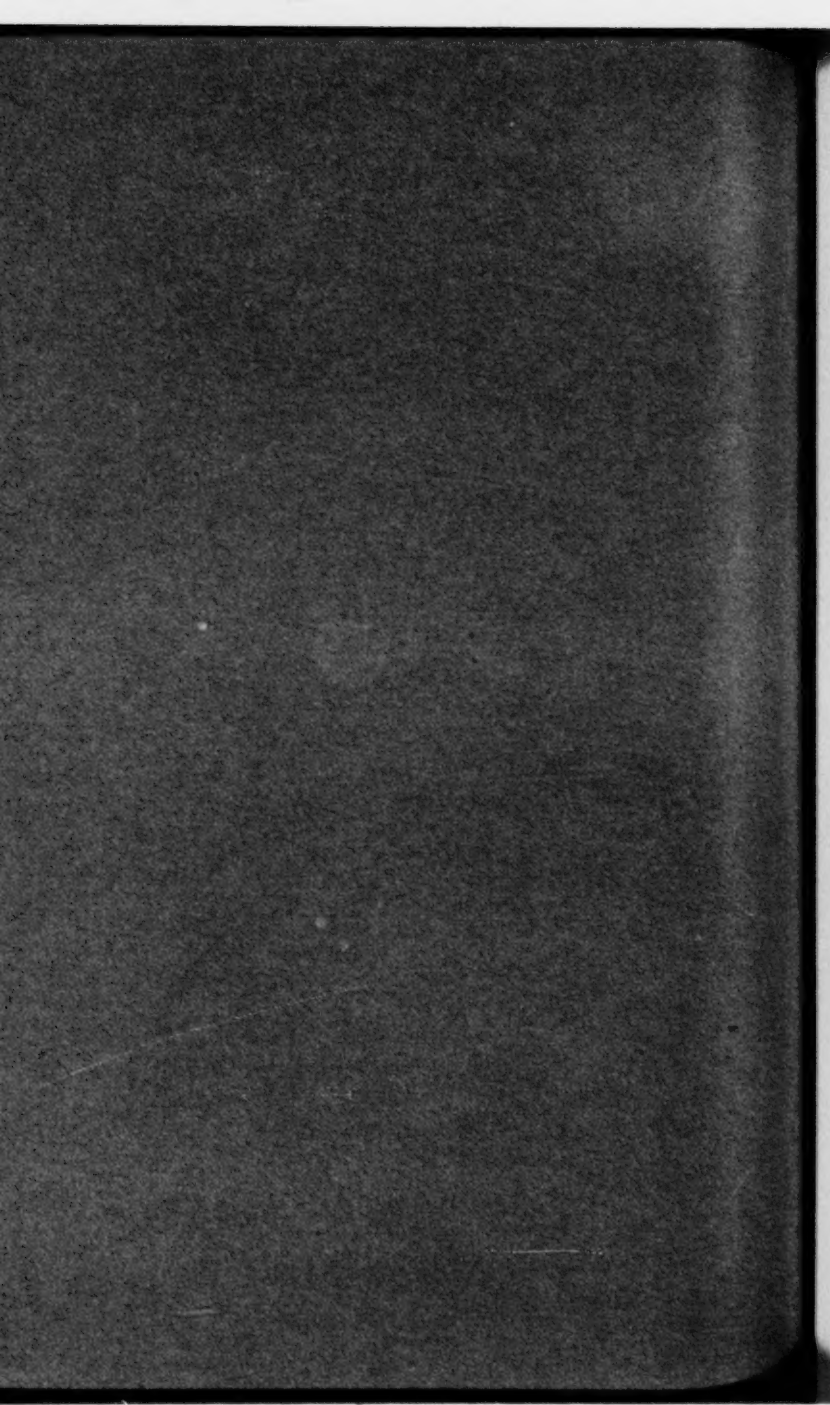
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AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN



IN THE  
SUPREME COURT OF THE  
UNITED STATES

October Term, 1945

No. ....

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BASIL R. CRAMPTON,  
*Petitioner,*

vs.

CRAMPTON MANUFACTURING COMPANY,  
*Respondent.*

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF

TO THE HONORABLE THE CHIEF JUSTICE AND  
ASSOCIATE JUSTICES OF THE SUPREME  
COURT OF THE UNITED STATES:

The brief for Respondent asserts that the Sixth C.C.A. held fact finding No. 11 clearly erroneous. If it did, it was in obvious error. If such error is immune to correction, Rule 52(a) is open to complete disregard by any Federal C.C.A. at will.

There is ample evidence in the record, necessarily referred to in the petition, to substantiate the trueness of the fact findings of the District Judge who tried the case and observed the witnesses and their demeanor.

As pointed out in petitioner's brief, the transcript clearly shows, as previously established, *too very old environments*.

In the final assemblies of petitioner's and respondent's handle and lever structures the off-set levers, each including a handle, inside lift arm and transverse "off-set rock shaft", or "spindle", or "extension", were both

initially divided, one at one end of the extension, (or spindle, or rock shaft), and the other at the other end for slipping the spud thereover. Both were old.

Therefore, there was no inventive step in connection with either of these old environments. The inventive step was something else.

Obviously and without question there was a change in structure over the prior art, by which the virtues of simplicity, durability, compactness, ease of mounting and economy were greatly increased over the earlier structures; and the inventive step is the same whether applied by permanently securing a handle at the outer end of the spindle (or "extension") which was integral with the inside lift arm, or whether it was done by securing the inside lift arm permanently and inseparably to the end of a spindle integral with the handle; and with both, provide a compact limiting rocking stop, and also an axial movement stop, as defined in claims 11, 12 and 13, to get such simplicity, ease of mounting, durability, economy, etc.

There is no question of a very marked, meritorious improvement having been made, establishing the *validity* of the patent, as expressly held by both lower courts.

If the Sixth C.C.A. did set aside fact finding No. 11 of the lower court, it has violated the provisions of rule 52(a). The Sixth C.C.A. does not expressly state anything about such fact finding 11, though in other parts of its decision, it refers to the lower court having found several meritorious features in the Crampton invention based on structure and that Theleen was not the Crampton invention, and it also expressly reaffirms the several virtues of the Crampton improvement which the lower court stated in its opinion, and further, substantially expressly affirms the fact finding 7 of the lower court's findings.

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We set forth the proposition that if the court did not expressly disregard such fact finding 11, or overrule it, contrary to rule 52(a), it must, not probably, but inevitably, have decided the case contrary to the applicable decisions of the Supreme Court.

What is not understandable in connection with respondent's brief, is that he states that the Sixth C.C.A. held the Crampton patent did have a limited range of equivalents, and then supports a decision which gives no equivalents, and according to which there could be no departure, colorable or otherwise, notwithstanding two directly old equivalent handle and rocking lever structures, divided initially, one at one end, and the other at the other end of the offset rock shaft intermediate portion to which the invention is and has been applied. And has supported the proposition of the Sixth C.C.A. of non-literal conformance of the words of the asserted claims on the infringing structure.

We are certain the words of the claims do literally apply, and have fully set forth the reasons for it in the petitioner's main brief. Surely the inside lift arm of the Pleasant patent et al in its permanent and secure and, in effect, integral connection with the spindle provides in substance the lever having the inside lift arm 5 of Crampton with its lateral extension 18, as a literal fact.

But what is of much greater importance than any fortune of the petitioner herein, is the question of whether or not, close copying with entire attainment of the virtues of economy, simplicity, compactness, etc. is done, by minor and significant colorable departure, taught by the prior art as an old environment, should be permitted, upon any basis of establishing a rule that mere narrow literalism controls. This is a question which has appeared in many decided cases, both in the Supreme Court and in the lower courts, and which Judge Denison of the Sixth C.C.A., years ago, completely and thoroughly analyzed. The apparent but not actually opposed decisions of the Supreme Court are set forth and a basis of clear distinction found in *D'Arcy v. Marshall Vent. Mattress Co.*, 259 Federal 236. Matters relating to old environment are not literally controlling, but instead, words of the claims directed to the *inventive step* control. Several cases of this Court of one type, and others of the other type, were analyzed and the reasons pursued why a literal application under some circumstances was followed and not in others. Where the words of the claim pertain to the *inventive step* which imports substantial functions, such words are literally en-

forced. But in both kinds of cases it is substantial identity in respect to the actual invention which rules.

The Sixth C.C.A. in this present case has attempted, we think by reasoning closely approaching sophistry, to say that, literally, the lever of the respondent's structure does not go through the base (spud) though unquestionably, in the assembled structure of respondent, there is an inside lift arm, having a permanent assembled connection therewith of the element, "spindle" or "offset rock shaft" or "extension", going through the base and having a permanent connection with the handle. We think and have strongly asserted proper application of the terms of the claims to the respondent's structure. But we further think, that it is an exceedingly important question, to all improvers or creators of new things, whether their inventions may be unblushingly appropriated, under cover of protection by the judiciary of this country, based on any such narrow illiberal bare word interpretation that the Sixth C.C.A. advanced, and with such interpretation carried to as far an extreme of literalism as is possible. And, further, if such Sixth C.C.A. was correct, as to literalism as a fact, that such fact would be controlling. It has violated its own enumerated principles stated in *D'Arcy v. Marshall*, *supra*.

There had never been previously any *permanent*, simple durable, compact, unit installed, economical flushing tank lever and handle assembly prior to Crampton. The statement with regard to Theleen at the bottom of page 4, continued on to page 5 all respondent's brief, is denied in the decisions and fact findings of *both* lower courts.

Moreover, the case largely relied upon by the petitioner, namely, *Sanitary Refrigerator Co. v. Winters, et al*, 50 S.C.T. 9, involved claims which were wholly *impossible to read literally* on the accused structure which this Court held did infringe. It is easy to get away from the literal claim, predicated on the best mode of embodying an invention, by reversing parts, which any mechanic can and does do, retaining every function, result, advantage, and benefit; and in some cases with slight impairing still getting most of the benefits. It is an invitation to infringe with impunity.

If the inventors of this country are to be subjected to such injustice, the quicker they find it out, the better. Also, the quicker small businesses started and sustained by patents will be finished, and actual monopoly of all of the industrial business of this country will pass into the hands of or under the control of a relatively few gigantic organizations.

\* \* \*

We think that it is for the Supreme Court of the United States, as the ultimate supervising authority, to exercise its power of review in a case like the present one, not for any benefit of the petitioner, Crampton, but in the interests of the whole country and the encouragement of advances in the mechanic arts.

For if it does not do so, it must inevitably cause those who do advance the mechanic arts to feel that all an infringer has to do is make a minor change, and drastic, and destructive narrowing in an illiberal spirit will be brought against him when he attempts to assert his property rights in his invention. That is a matter of correcting the subordinate judiciary, in the present case, where the Sixth C.C.A. has "so far departed from the accepted and usual course of judicial proceedings", that it has either violated rule 52 (a); or has decided one of the most controlling questions of the patent law relating to infringement in obvious conflict with the applicable decisions of this Court.

\* \* \*

Crampton is an inventive genius in decreasing costs and producing greatly simplified and more durable things, and has proved it for more than 35 years continuous activity. His fortune is not dependent upon this patent case at all. In fact, the business has now been sold and taken over by a small corporation. He has all ready improved the present flushing tank lever in economy, and the new management running the business is about to market such new lever at a lower price with profit. As a matter of fact, an inventive genius does not need much in the way of patent protection, for though infringers may appropriate, they are always behind, and while they can copy what they can see they can not copy the mind, as truly stated in a familiar quotation from one of Kipling's poems.

But there are others who make valuable improvements which sustain or start small businesses, who do need patent protection, and need as liberal a treatment with regard to their property rights in patents as others in connection with their property rights of a different type.

It is believed that valid patent property and one of great merit, under the doctrine of, *Eibel Process Company v. Minnesota and Ontario Paper Co.*, 43 S.C.T. 322, has not yet been totally destroyed; but if it is to be, we believe it is a duty which the Supreme Court owes to this country to say that the Eibel Process case doctrine is no longer valid. For in this case, the *validity* of the patent is sustained by both lower courts, and the *virtues* of the improvement are recited by both courts in express terms. If an infringer can so closely copy, as in this case, and after such infringer in settling an account against it, sold back to Crampton all of his rights under the patent (fact findings 9 and 10), those who have devoted their lives to the obtaining and sustaining of the rights of those who have made valuable inventive improvements, must inevitably conclude that the more than a century old encouragement of the advancement of the mechanic arts and sciences has now been changed into a discouragement of them.

The lower court Judge who heard this case, saw the witnesses and heard their testimony, Judge Raymond, recently deceased, was of outstanding ability and universally recognized as among the most capable in the Federal Judiciary. His fact findings in this case are certain, sure, and absolutely correct. His application of the decisions of this Court was sound and correct. The Sixth C.C.A. erred unquestionably in reversing his finding of infringement.

It is realized, of course, that perfection in a final decision is not necessarily required and, particularly if it affects only the litigants. But where it goes farther and affects the whole patent protection system, then we believe a decision of the kind that was handed down by the Sixth C.C.A. in this case, as a matter of great public interest, does require its review and correction by the final ultimate Court of this country.

## SUMMARY AND CONCLUSION

According to respondent's brief, and as one of the reasons for asking for the grant of the writ by petitioner, the Appellate Court did overrule, or vacate, or hold clearly erroneous fact finding 11 of the District Court. This fact finding was made by a District Judge of highest ability and exceptionally long experience, who heard every word of every witness, and carefully reviewed every exhibit. And, of course, as repeatedly stated, the only difference was that the part of the structure of the patent and of the respondent's devices, which include specifically, the outside handle, the inside lift arm and the cross connecting portion, called variously "extension", or "spindle" or "offset rock shaft", and which are in every effect, integral from one end to the other, initially in their manufacture, were divided between their ends, one at one end of this "offset rock shaft", and the other at the other, both very old. The spud could be slipped over the rock shaft, in both. In the patent, it was at one end, and in the infringing structure, at the <sup>other</sup> end of such "extension", "spindle", or "rock-shaft". The final securing together made, in both, a permanent, and in effect, integral connection, so that this rocking lever member, operated by the handle, was the same identically in both completed structures.

Does a Circuit Court of Appeals, under such circumstances, have any license to determine that fact finding 11 of the lower court was clearly erroneous? We do not think so and we submit that the Supreme Court of the United States should clearly intervene and review this case.

If, on the other hand, the Sixth C.C.A. did accept all the fact findings of the District Court, then it must have accepted fact finding 11 along with the rest. Such a fact finding requires the same conclusion that was reached in *Sanitary Refrigerator Co. v. Winters, et al, supra*, and the conclusion reached by the Appellate Court must be necessarily erroneous as a matter of law.

Validity is not a question. It is wholly unimportant herein whether or not some lower courts and some judges of them have stated that the Supreme Court of the United States has raised the standard of invention. Whether or

not this is true, the patent in question, of such merit that it immediately and promptly superseded everything in its field, has been expressly held *valid* by both lower courts and, certainly, this Court accepts that conclusion in accordance with two of its most recent patent cases: *Goodyear Co. v. Ray-O-Vac Co.* and *Williams v. United Machine Corp.* both cited in petitioner's main brief. A patent of this type held valid, and so highly meritorious that it immediately supplanted and superseded everything else in its field, is not to be struck down by either attempted narrow literalism or other destructive narrow interpretation. To do so is to violate unconscionably the applicable decisions of this Court. Particularly is this true, when all courts have conceded that the patent should have a limited range of equivalents.

Finally, if a Circuit Court of Appeals, wholly erroneously, and so far as this case is concerned, incompetently did hold fact finding 11 of the District Court clearly erroneous, then rule 52(a) might just as well be erased; that is, if the Supreme Court will not examine and determine which of the two lower courts was right as to facts stated in fact finding 11. For if the Supreme Court refuses such examination, it merely has licensed Circuit Courts of Appeals to do as they please with the fact findings of a lower court, as, under such circumstances, any Circuit Court of Appeals can do as it wants without chance of review; and such rule 52(a) become a dead letter.

Throughout all briefs for petitioner in this proceeding, we have asked for consideration of a patent as *property*, and the Crampton patent having been held *valid*, it is established that it is legitimate property, differing from no other property, and having due to it the same protection as all property, in accordance with *Cammeyer v. Newton*, 94 U. S. 255; 24 L. Ed. 72, and *Rohmer, et al v. Commissioner of Internal Revenue*, 68 U.S.P.Q. 433, (Second C.C.A.) as follows:

(3) "The 'property' of the owner of a copy-right (like that of a patentee), because of his 'monopoly' power, is sometimes thought to be utterly different from other kinds of property. But his 'monopoly' power is not markedly distinct from that of owners of

other sorts of 'property'. For it is of the essence of 'property', generally that its owner has the right, enforceable by court action, to *exclude* others from its use, absent his consent; and that power to exclude is what 'monopoly' ordinarily means."

Very respectfully,

FRANK E. LIVERANCE, JR.,  
*Attorney for Petitioner.*

Grand Rapids, Michigan  
April 22, 1946.